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OFFICE OF PETITIONS

In re Application of	:	
Simmons	:	
Application No. 09/595,473	:	
Patent No. 6,378,463	:	DECISION ON PETITION
Filed: June 16, 2000	:	PURSUANT TO 37 C.F.R.
Issue Date: April 30, 2002	:	§ 1.378(B)
Title: INTERACTIVE PET DEVICE	:	

This is a decision on the petition filed on July 26, 2010, pursuant to 37 C.F.R. § 1.378(b) to revive the above-identified application.

This petition pursuant to 37 C.F.R. § 1.378(b) is DISMISSED.

Background

The patent issued on April 30, 2002. The grace period for paying the 3½-year maintenance fee provided in 37 C.F.R. § 1.362(e) expired at midnight on April 30, 2006, with no payment received. Accordingly, the patent expired on April 30, 2006 at midnight.

Any petition to accept an unavoidably delayed payment of a maintenance fee filed under 37 C.F.R. § 1.378(b) must include:

- (1) the required maintenance fee set forth in 37 C.F.R. § 1.20 (e) through (g);
- (2) the surcharge set forth in 37 C.F.R. § 1.20(i)(1), and;

- (3) a showing that the delay was unavoidable since reasonable care was taken to ensure that the maintenance fee would be paid timely and that the petition was filed promptly after the patentee was notified of, or otherwise became aware of, the expiration of the patent - the showing must enumerate the steps taken to ensure timely payment of the maintenance fee, the date and the manner in which patentee became aware of the expiration of the patent, and the steps taken to file the petition promptly.

With this petition, Petitioner has submitted the surcharge associated with a petition to accept the late payment of a maintenance fee as unavoidable, along with both the 3½-year and the 7½-year maintenance fees, and a statement of facts.

Petitioner has met the first and second requirements of Rule 1.378(b). The third requirement of Rule 1.378(b) will be discussed below.

The standard

35 U.S.C. § 41(c)(1) states, *in pertinent part*:

The Director may accept the payment of any maintenance fee... after the six-month grace period if the delay¹ is shown to the satisfaction of the Director to have been unavoidable.

37 C.F.R. § 1.378(b)(3) is at issue in this case. Acceptance of a late maintenance fee under the unavoidable delay standard is considered under the same standard for reviving an abandoned application under 37 C.F.R. § 1.137(a). This is a very stringent standard. Decisions on reviving abandoned applications on the basis of "unavoidable" delay have adopted the reasonably prudent person standard in determining if the delay was unavoidable:

The word 'unavoidable' ... is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business.²

¹ This delay includes the entire period between the due date for the fee and the filing of a grantable petition pursuant to 37 C.F.R. § 1.378(b).

² In re Mattullath, 38 App. D.C. 497, 514-15 (1912) (quoting Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (1887)); see also Winkler v. Ladd, 221 F. Supp. 550, 552, 138 U.S.P.Q. 666, 167-68 (D.D.C. 1963), aff'd, 143 U.S.P.Q. 172 (D.C. Cir. 1963); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (1913).

In addition, decisions are made on a "case-by-case basis, taking all the facts and circumstances into account." Nonetheless, a petition cannot be granted where a petitioner has failed to meet his or her burden of establishing that the delay was "unavoidable."³

The burden of showing the cause of the delay is on the person seeking to revive the application.⁴

Application of the standard to the current facts and circumstances

Petitioner's explanation of the delay has been considered, and it has been determined that it fails to meet the standard for acceptance of a late payment of the maintenance fee and surcharge.

The period for paying the 3½-year maintenance fee without the surcharge extended from April 30, 2005 to October 30, 2005 and for paying with the surcharge from October 31, 2005 to April 30, 2006. Thus, the delay in paying the 3½-year maintenance fee extended from April 30, 2006 at midnight to the filing of this petition on July 26, 2010.

With this petition, Petitioner has asserted that he has "been out of work since 2005," spoke with his family "last year 2009" about his "situation," and on an unspecified date, he received "help" from his brother. The statement of facts strongly suggests, but does not explicitly state, that Petitioner lacked the funds necessary to submit the required maintenance fees or the surcharge associated with the filing of this petition due to the fact that he was unemployed, this financial hardship continued until he received money from his brother, and that money was submitted with this petition. Petitioner must notify the Office if this is not a correct interpretation of the statement contained in this petition.

First, the record does not contain a showing that Petitioner had **steps** in place to ensure the timely submission of the maintenance fees. An adequate showing that the delay in payment of the maintenance fees at issue was "unavoidable" within the meaning of 35 U.S.C. 41(c) and 37 CFR 1.378(b)(3) requires a

³ Haines v. Quigg, 673 F. Supp. at 316-17, 5 U.S.P.Q.2d at 1131-32.

⁴ Id.

showing of the steps taken to ensure the timely payment of the maintenance fees for this patent. Where the record fails to disclose that the patentee took reasonable steps to ensure timely payment of the maintenance fees, 35 U.S.C. § 41(c) and 37 C.F.R. § 1.378(b)(3) preclude acceptance of the delayed payment of the maintenance fee under 37 CFR § 1.378(b).

Second, the record does not reveal the date and the manner in which Patentee became aware of the expiration of the patent.

Third, regarding the implied assertion of financial hardship, Petitioner should note that a showing of "unavoidable" delay based upon financial hardship is very stringent; in order for a petitioner to demonstrate that he lacked the financial resources to pay the fee(s) associated with the patent, substantial documentation must be provided. Such a showing must be supported by a complete and thorough showing of his financial condition during the entire period between April 30, 2006 and July 26, 2010, including income, expenses, tax return statements, bank records, assets, credit and obligations, which made the delay in payment of the maintenance fees as well as the fee associated with the filing of this petition unavoidable. Petitioner should provide copies of all documents or records pertaining to each of these so as to confirm the financial difficulty.

Petitioner is cautioned to avoid submitting confidential information that may contribute to identity theft. Specifically, Petitioner should consider redacting social security, bank account, or credit card numbers from any documents submitted to the USPTO. This type of personal data is never required by the USPTO to support a petition or an application. Petitioner is advised that any information submitted may be disclosed, as a routine use, to the public after either publication of the application, unless a non-publication request is made in the application, or issuance of a patent. Further, a record may be disclosed, subject to the limitations of 37 C.F.R. § 1.14, as a routine use, to the public if the record was filed in an application which became abandoned or in which the proceedings were terminated and which application is referenced by either a published application, an application open to public inspection, or an issued patent.

Conclusion

Any request for reconsideration of this decision must be filed within **TWO MONTHS** of the mailing date of this decision. Any such petition for reconsideration must be accompanied by the \$400 petition fee set forth in 37 C.F.R. § 1.17(h). After decision on the petition for reconsideration, no further reconsideration or review of the matter will be undertaken by the Commissioner. Accordingly, on request for reconsideration, it is extremely important that Petitioner supply any and all relevant information and documentation in order to meet his burden of showing unavoidable delay. This includes statements by all persons with direct knowledge of the cause of the delay, setting forth the facts as they know them. Petitioner must provide documentation and address the deficiencies noted above. If on request for reconsideration, the delayed payment of the maintenance fees is not accepted, then the maintenance fees are subject to refund following the decision on the petition for reconsideration, or after the expiration of the time for filing such a petition for reconsideration, if none is filed.

The reply should include a cover letter entitled "Renewed Petition pursuant to 37 C.F.R. § 1.378(e)". This is not a final agency action within the meaning of 5 U.S.C § 704.

Any response to this decision should indicate in a prominent manner that the attorney handling this matter is Paul Shanowski, and may be submitted by mail,⁵ hand-delivery,⁶ or facsimile.⁷ Registered users of EFS-Web may alternatively submit a response to this decision via EFS-Web.⁸

The file does not indicate a change of address has been submitted, although the address given on the petition differs from the address of record. If appropriate, a change of fee address (form PTO/SB/47) and a request for customer number (form PTO/SB/125) should be filed in accordance with Manual of Patent Examining Procedure, section 2540. A courtesy copy of this decision is being mailed to the address given on the petition; however, the Office will mail all future correspondence solely to the address of record.

5 Mail Stop Petition, Commissioner for Patents, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA, 22313-1450.

6 Customer Window, Randolph Building, 401 Dulany Street, Alexandria, VA, 22314.

7 (571) 273-8300 - please note this is a central facsimile number.

8 <https://portal.uspto.gov/authenticate/authenticateuserlocalepf.html>

The general phone number for the Office of Petitions which should be used for status requests is (571) 272-3282. Telephone inquiries regarding this decision should be directed to the undersigned at (571) 272-3225. Inquiries pertaining to the submission of maintenance fees should be directed to the Maintenance Fee branch at 571-272-6500.

/Paul Shanowski/
Paul Shanowski
Senior Attorney
Office of Petitions

cc: Francis Simmons
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